A

WAN SAGAR WAN EMBONG

v.

HARUN TAIB (NO 2)

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF CJ (MALAYA)
ARIFIN ZAKARIA FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 01(f)-2-2008 (T)]

C

16 SEPTEMBER 2008

ELECTION: *Petition - Petition to set aside election - Appeal against striking out of petition - Inclusion of evidence in petition - Allegations of corrupt practices - Whether there was failure to plead sufficient facts and*

D

grounds - Election Petition Rules 1954, r. 5

ELECTION: *Petition - Petition to set aside election - Appeal against striking out of petition - Principles of Election Law - Allegations of corrupt practices committed by agents of candidate - Agency - Pleadings - Election Offences Act 1954, s. 32(c)*

E

AGENCY: *Appointment requirements - Agents of election candidate - Allegations of corrupt practices committed by agents - Principles of Election Law - Nexus or connection between alleged agents and candidate - Pleadings - Election Offences Act 1954, s. 32(c)*

F

ELECTION: *Petition - Petition to set aside election - Appeal against striking out of petition - Election Law - Burden of proof - Whether rested on both parties - Whether premature to raise issue before full trial - Election Petition Rules 1954, r. 4(1)*

G

EVIDENCE: *Burden of proof - Election offences - Principles of Election Law - Whether burden of proof rested on both parties - Whether premature to raise issue before full trial - Election Petition Rules 1954, r. 4(1)*

H

ELECTION: *Petition - Petition to set aside election - Appeal against striking out of petition - Alleged misconducts - Requirements, whether different - Acts of general intimidation - Failure to plead material facts and grounds to support claim - Election Offences Act 1954, s. 32(a), (c)*

I

This was an appeal against the decision of the Election Judge ('EJ') at the High Court striking out an election petition filed by the appellant (the petitioner in the High Court) following a preliminary objection raised by the first respondent. In respect of this appeal, the following five questions required determination: (i) whether the EJ erred in law in requiring the inclusion of "evidence" in the petition whereas r. 5 of the Election Petition Rules 1954 ('EPR') provides that evidence need not be stated in the petition; (ii) whether the EJ had applied the correct principles on the issues of "agency" in Election Law in relation to the contents of the petition which showed that the appellant had pleaded that the corrupt practices were committed by the agents of the first respondent and thereby had duly stated the facts and grounds to support the petition under s. 32(c) of the Election Offences Act 1954 ('EOA'); (iii) whether in relation to "burden of proof", the EJ had failed to recognise that the principles on Election Law differed from Civil Law in that under Election Law the burden of proof rested on both parties; (iv) whether in relation to s. 32(a) and (c) of the EOA, the EJ had failed to take into account the different requirements to prove the alleged misconducts under this section; and (v) whether in relation to the plea of general intimidation under s. 32(a) of the EOA, the EJ failed to recognise that the appellant had pleaded sufficient facts in support and the issue of proof of general intimidation was to be determined only after a full trial.

Held (dismissing the appeal)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) The EJ in his judgment had not intended it to mean that the appellant as the petitioner was required to plead evidence in his petition. What the EJ meant was for the appellant to have already with him sufficient evidence to present his case at the trial in order for him to be able in the petition filed to set out the facts and grounds relied on to sustain the prayer. The EJ had not erred in law or in fact in concluding that the appellant had failed to plead sufficient facts and grounds to indicate that the corrupt practice under s. 32(c) of the EOA was committed by the first respondent or with his knowledge or consent or by an agent of the first respondent. The EJ had correctly stated that the appellant as the petitioner would be

A required to state with precision such acts or instances which could be attributed to the first respondent to indicate his culpability and which he would have to verify at the hearing of the petition. (paras 17 & 20)

B **(2)** With regard to question (ii), the EJ was correct to conclude that the fact that a group of ten persons had held up a registered voter, that from amongst them one known to the voter had worn a PAS logo and yet another in the group was recognised by the voter as the person who punched him, C without more, was insufficient to show the culpability of the first respondent in the incident, for this may well indicate that they were mere supporters whose acts the first respondent may not have had any control of. The pleading in the petition filed by the appellant on agency rested on mere conjecture. D Although the principles applicable in Election Law are wider, they should not be so extended as to cast the net of agency too wide to include even ordinary party supporters. There had to be an element of "appointment" wherein there was a nexus or connection between the named or identified persons alleged E to be the "agents" and the first respondent as the candidate. The appellant had to plead this to allow the first respondent to meet the case. Based on the factual circumstances of the present case, the EJ was correct in requiring the appellant to plead facts and grounds to show that the corrupt practice was F committed, *inter alia*, by any "agent" of the first respondent. The appellant, however, had failed to do so. (paras 21, 22 & 23)

(3) In respect of question (iii), the EJ was correct not to have addressed the issue of burden of proof directly since he was G deciding on the preliminary objection raised based on the tested principles and rules of Election Law. Where the appellant's pleading fell foul of r. 4(1) of the EPR the appellant could not argue that the burden lay on both parties. H The issue of the first respondent having to prove matters within his peculiar knowledge related properly to the shifting of the burden during the adduction of evidence at full trial. This particular ground of appeal raised by the appellant at this stage where the petition had not proceeded to full trial was I premature. (para 24)

(4) Dealing with questions (iv) and (v) together, the EJ was correct to hold that since the petition under s. 32(a) of the EOA alleging that acts of intimidation had so extensively prevailed that they may be reasonably supposed to have affected the result of the election was premised on the same facts and grounds as alleged under s. 32(c) of the EOA, it must therefore suffer the same fate. This issue relating to the requirement of s. 32(a) and (c) of the EOA was extensively argued before the EJ wherein he had made a finding that the pleading failed to state the material facts and grounds to support the claim under s. 32(a) and (c) of the EOA. It may be true that different requirements were to be satisfied to show the elements of the respective acts of misconduct under s. 32(a) and (c) of the EOA, but with regard to the facts and grounds relied on by the appellant it had been shown that they were the same – that they related to the incident where it was alleged that a voter was prevented from voting and unable to vote. (para 25)

(5) For the reasons stated above, this appeal should be dismissed with costs. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan menentang keputusan Hakim Pilihanraya ('HP') di Mahkamah Tinggi membatalkan sesuatu petisyen pilihanraya yang difailkan oleh perayu (pempetisyen di Mahkamah Tinggi) selepas suatu bantahan permulaan dibangkit oleh responden pertama. Berhubungan dengan rayuan ini, lima soalan berikut perlu diselesaikan: (i) sama ada HP khilaf dalam undang-undang bila memerlukan pemasukan "keterangan" di dalam petisyen sedangkan k. 5 Kaedah-kaedah Petisyen Pilihanraya 1954 ('KPP') memperuntukkan bahawa keterangan tidak perlu dinyatakan di dalam petisyen; (ii) sama ada HP telah menggunakan prinsip-prinsip betul terhadap isu-isu "agensi" dalam Undang-undang Pilihanraya berkaitan dengan kandungan petisyen tersebut yang menunjukkan perayu telah memplid bahawa perbuatan rasuah telah dilakukan oleh agen-agen responden pertama dan dengan itu telah menyatakan fakta dan alasan untuk menyokong petisyen di bawah s. 32(c) Akta Kesalahan Pilihanraya 1954 ('AKP'); (iii) sama ada berkaitan dengan "beban membukti", HP telah gagal menyedari bahawa prinsip-prinsip Undang-undang Pilihanraya berlainan dari

A Undang-undang Sivil dalam mana di bawah Undang-undang Pilihanraya beban membukti terletak atas kedua-dua pihak; (iv) sama ada berkaitan dengan s. 32(a) dan (c) AKP, HP telah gagal mengambil kira keperluan-keperluan berbeza untuk membuktikan salah laku yang dikatakan di bawah seksyen ini; dan (v) sama ada
B berhubungan dengan akuan intidimasi am di bawah s. 32(a) AKP, HP gagal menyedari bahawa perayu telah memplid fakta yang mencukupi dan isu membukti intidimasi am akan ditentukan hanya selepas perbicaraan penuh.

C **Diputuskan (menolak rayuan)**
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) HP dalam penghakimannya tidak bermaksud untuk ianya
D bermakna bahawa perayu sebagai pempetisyen perlu memplid keterangan dalam petisyennya. Apa yang dimaksudkan oleh HP ialah untuk perayu sudah ada dengannya cukup keterangan untuk mengemukakan kesnya di perbicaraan supaya beliau berupaya dalam petisyen yang difail itu menyatakan fakta dan
E alasan yang diharap untuk kekalkan permohonannya. HP tidak khilaf dalam undang-undang atau pun fakta dalam memutuskan bahawa perayu telah gagal memplid fakta dan alasan yang mencukupi untuk menunjukkan bahawa perbuatan rasuah di bawah s. 32(c) AKP telah dilakukan oleh responden pertama
F atau dengan pengetahuan dan kebenarannya atau oleh seorang agen responden pertama. HP telah menyatakan dengan betul bahawa perayu sebagai pempetisyen perlu nyatakan dengan tepat apa-apa perbuatan atau kejadian yang boleh dianggap berpunca dari responden pertama untuk menunjukkan
G kebersalahannya dan mana beliau perlu tentu-sah di pembicaraan petisyen tersebut.

(2) Berhubungan dengan soalan (ii), HP memutuskan dengan betul bahawa fakta bahawa satu kumpulan yang terdiri daripada sepuluh orang telah melenggahkan seseorang
H pengundi berdaftar, bahawa antara mereka salah seorang yang dikenali oleh pengundi memakai suatu logo PAS dan lagi seorang dalam kumpulan itu telah dicam oleh pengundi sebagai orang yang menumbuknya, tanpa lagi, tidak mencukupi untuk membuktikan kebersalahan responden pertama dalam insiden
I itu, kerana ini mungkin menunjukkan bahawa mereka hanya

penyokong yang tindakan mereka tidak dikawal oleh responden pertama. Pliding di dalam petisyen yang difail oleh perayu bergantung kepada terkaan semata-mata. Walaupun prinsip-prinsip yang dipakai dalam Undang-undang Pilihanraya merupakan lebih luas, mereka tidak patut dilanjutkan begitu banyak sehingga menebarkan jaring agensi terlalu luas untuk merangkumi penyokong biasa suatu parti. Mesti ada elemen "pelantikan" di mana terdapat nexus atau hubungan di antara orang yang dinamakan atau yang dicamkan yang dikatakan menjadi "agen-agen" dan responden pertama sebagai calon. Perayu terpaksa memplid ini bagi membenarkan responden pertama berdepan dengan kes itu. Berdasarkan halkeadaan fakta kes ini, HP memang betul dalam memerlukan perayu memplid fakta dan alasan untuk menunjukkan bahawa perbuatan rasuah telah dilakukan, antara lain, oleh mana-mana "agen" responden pertama. Perayu, walau bagaimanapun, gagal berbuat sedemikian.

(3) Berkaitan dengan soalan (iii), HP memang betul apabila tidak membicarakan isu beban membukti secara terus sebab beliau sedang memutuskan atas bantahan permulaan yang dibangkit berdasarkan prinsip-prinsip dan kaedah-kaedah Undang-undang Pilihanraya yang telah teruji. Di mana pliding perayu melanggari k. 4(1) KPP perayu tidak boleh mendakwa bahawa beban tersebut terletak atas kedua-dua pihak. Isu mengenai responden pertama semestinya membuktikan perkara-perkara dalam pengetahuan tersendirinya berkaitan dengan pemindahan beban tersebut semasa keterangan dikemukakan di perbicaraan penuh. Alasan rayuan khusus ini yang dibangkit oleh perayu di peringkat ini di mana petisyen belum lagi sampai perbicaraan penuh dibuat terlalu awal.

(4) Menyelesaikan soalan-soalan (iv) dan (v) bersama-sama, HP memutuskan dengan betul bahawa oleh kerana petisyen di bawah s. 32(a) AKP menyatakan bahawa perlakuan intidimasi telah berlaku dengan begitu banyak dan dengan itu boleh dikatakan dengan munasabah telah menggangu keputusan pilihanraya berpremis atas fakta dan alasan sama yang dikatakan di bawah s. 32(c) AKP, ia semestinya, oleh itu, mengalami nasib yang sama. Isu ini yang berkaitan dengan s. 32(a) dan (c) AKP telah dihujah secara ekstensif di hadapan HP di mana beliau membuat keputusan bahawa pliding itu

gagal menyatakan fakta dan alasan material untuk menyokong tuntutan tersebut di bawah s. 32(a) dan (c) AKP. Ia mungkin benar bahawa keperluan berbeza patut dipenuhi untuk menunjukkan elemen-elemen perbuatan salah laku masing-masing di bawah s. 32(a) dan (c) AKP, tetapi berhubungan dengan fakta dan alasan yang perayu bergantung kepada ia telah dibuktikan bahawa mereka adalah sama – bahawa mereka berkaitan dengan insiden di mana ia dikatakan seorang pengundi telah dihalang dari mengundi dan tidak dapat mengundi.

(5) Disebabkan alasan-alasan yang dinyatakan di atas, rayuan ini patut ditolak dengan kos.

Case(s) referred to:

Ali Amberan v. Tunku Abdullah [1969] 1 LNS 6 HC ***(foll)***
Azhar Hussain v. Rajiv Gandhi AIR [1986] Vol 73 SC ***(refd)***
Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya & Ors [2005] 2 CLJ 237 FC ***(refd)***
Devan Nair v. Yong Kuan Teik [1967] 1 LNS 37 ***(refd)***
Gan Joon Zin v. Fong Kui Lun & Ors [2004] 4 CLJ 729 FC ***(refd)***
Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition) [2001] 3 CLJ 161 HC ***(refd)***
Laxmi Narayan Nayak v. Ramratan Chaturvedi [1990] 2 SCC 173 ***(refd)***
Muip Tabib v. Dato James Wong [1970] 1 LNS 83 HC ***(refd)***
Patau Rubis v. Patrick Uren & Anor [1984] 1 CLJ 51 HC; [1984] 2 CLJ (Rep) 348 HC ***(refd)***
Wan Daud Wan Jusoh v. Mohamed Hj Ali & Anor [1988] 2 MLJ 384 ***(refd)***

Legislation referred to:

Election Offences Act 1954, ss. 4(d), 9(1), 32(a), (b), (c), 34(a)
Election Petition Rules 1954, rr. 4(1)(b), 5
Elections (Conduct of Elections) Regulations 1981, r. 14

For the appellant - Firuz Hussein Ahmad Jamaluddin (Mohd Hafarizam Harun, Shem Shawal Azraai, Mohd Rafaei Adnan, Julita Ilhari Abdul Jabbar, Cheng Mai & Nik Mohd Nasir Nik Hussin with him); M/s Ahmad Shahabuddin & Co
For the respondent - Dato' Wan Abd Muttalib Embong (Hj Mohamad Arif Md Yusof, Abd Haris Abd Malik, Saiffuddin Othman, Mohd Zabidi Yusof & Mohd Kamaruzaman Abd Wahab with him); M/s Wan Abdul Mutalib & Co

[Appeal from High Court, Kuala Terengganu; Election Petition No: 03-2008]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] This is an appeal from the decision of the Election Judge at the High Court in Kuala Terengganu in which the election petition filed by the appellant (petitioner in the High Court) was struck out following a preliminary objection raised by the first respondent. The appellant was the Barisan Nasional candidate in the Twelfth General Election for a seat in the State Legislative Assembly for the constituency of Manir, which was held on 8 March 2008 whilst the first respondent was the PAS candidate. The first respondent was declared as the duly elected member of the said constituency of Manir by polling 5,323 against the appellant's 4,917 votes – a majority of 406. The appellant claimed the right to present this petition under s. 34(a) of the Election Offences Act 1954 ("EOA") as a person who has the right to be returned or elected at the election. The appellant was dissatisfied over alleged acts of bribery, corrupt practice or illegal practice, violence, intimidation and non-compliance with the election laws arising from the election held and accordingly filed an Election Petition based on the grounds set out in ss. 32(a), (b) and (c) of the EOA, read with r. 4(1) of the Election Petition Rules 1954 ("EPR"). Section 32(a), (b) and (c) of the EOA reads as follows:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate.

[2] Rule 4(1) of the EPR reads as follows:

> An election petition shall contain the following statements:
>
> (a) it shall state the right of the petitioner within section 34 of the Act; and
>
> (b) it shall state the holding and result of the election and shall briefly state the facts and grounds relied on to sustain the prayer.

[3] Based on the particulars furnished by the appellant in the petition it would appear that the petition arose from two incidents which occurred on election day 8 March 2008. We reproduce below the relevant facts of the two incidents and the complaints made by the appellant:

The First Incident

[4] At about 10am at the entrance of the Sekolah Kebangsaan Teluk Menara Polling Centre, on election day 8 March 2008, the first respondent through his agents or representatives consisting of ten Malay persons had attempted to obstruct voters from voting by holding up a registered voter Muhammad Amiruddin Mariappan bin Abdullah. A person from among the group who was wearing a PAS symbol whom the voter recognized as Saidi bin Samad took the voter's wallet which contained his identity card and cash of RM2,000. Another person whom the voter recognized as Faizal Ali punched the voter on his left cheek. Yet another whom he also recognized hit him. The voter was accused of being a Bangladeshi.

[5] As a result of the incident the voter was unable to vote on the voting day and a report of the incident was lodged by the voter at the Manir Police Station on the same day *vide* Report No. 000280/08.

[6] In the event the appellant claimed that the first respondent had directly or indirectly, by himself or by any other person on his behalf committed acts of undue influence under s. 9(1) of the EOA which constitutes corrupt practice or illegal practice under s. 32(c) of the EOA.

[7] On the same facts as described the appellant claimed that acts of general intimidation had so extensively prevailed at the Manir State Constituency that it may be reasonably supposed to have affected the result of the election thereby constituting a ground under s. 32(a) of the EOA to declare the election of the constituency void.

The Second Incident

[8] At about 2pm on election day 8 March 2008, a registered voter of the constituency Mustaffa bin Yusof went to the voting place at Channel 2 Sekolah Kebangsaan Teluk Menara Polling Centre, Manir for the purpose of voting. While entering the voting place and after handing over his identification card to the agent or representative of the second and the third respondents the voter was informed that his name on the electoral list had been underlined indicating that he had already voted and was thereby prevented from voting.

[9] In the event the appellant claimed that the second respondent as an agent or representative of the Election Commission, the third respondent, had failed to execute his duty in failing to provide Form 11 to the voter to enable him to vote as required under r. 14 of the Elections (Conduct of Elections) Regulations 1981 and had thereby willfully prevented a registered voter from voting contrary to s. 4(d) of the EOA. The act of the second respondent, election officer, it is contended for the appellant constitutes a non-compliance with the provisions of a written law and thereby provides a reasonable ground for the court to declare the election result of the Manir State Constituency null and void under s. 32(b) of the EOA.

[10] Further the appellant claimed that the cumulative effect of the incidents described had given rise to extensive prevalence of general intimidation thereby providing further ground for the court to declare the election of the Manir State Constituency void under s. 32(a) of the EOA.

Decision

[11] It is necessary at the outset to state that at the hearing of the petition before the Election Judge the appellant withdrew his petition against the second and the third respondents with their consent thereby leaving only the petition against the first

respondent. Before the learned Election Judge the first respondent raised a five-point preliminary objection on the petition based on the following grounds:

(i) that the petitioner has not complied with the requirements of r. 4(1)(b) of the EPR;

(ii) that the petitioner has failed to properly plead his allegations under s. 32(a) and (c) of the EOA;

(iii) that by virtue of the agreement between the petitioner and the second and third respondents to enable the latter to be excluded from the petition, then it is no longer possible for the petitioner to proceed under s. 32(b) of the EOA;

(iv) that the petitioner failed to plead the serial number in the electoral roll of the voter named Muhammad Amiruddin Mariappan bin Abdullah;

(v) that the petitioner failed to plead whether the voter named Muhammad Amiruddin Mariappan bin Abdullah in fact had cast his vote on the polling day.

[12] The learned Election Judge in his judgment amongst others found that only ground (i) read with ground (ii) above are of substance worthy of consideration which requires him to decide whether the appellant as the petitioner has pleaded the facts and grounds necessary to sustain the petition under s. 32(a) and s. 32(c) of the EOA. We would state here that on this point, we agree with the learned Election Judge's finding. As regards whether the appellant has pleaded facts and grounds necessary to sustain the petition under s. 32(b) of the EOA the learned Election Judge took the view that any miscreant of the supervising officer in refusing to allow the voter, Mustaffa bin Yusof to exercise his right to vote in the second incident even if proved would not affect the result of the election wherein he relied on the principle laid down by the Federal Court in the case of *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors.* [2005] 2 CLJ 237.

[13] In the Memorandum of Appeal filed before this court the appellant has raised fifteen grounds of appeal. However from the submissions and arguments made by learned counsel for both the parties, we find that what need to be decided in this appeal are focused principally on the following five questions:

(i) whether the learned Election Judge erred in law in requiring the inclusion of "evidence" in the petition whereas r. 5 of the EPR provide that evidence need not be stated in the petition;

(ii) whether the learned Election Judge had applied the correct principles on the issues of "agency" in Election Law in relation to the contents of the petition which showed that the appellant has pleaded that the corrupt practices were committed by the agents of the first respondent and thereby has duly stated the facts and grounds to support the petition under s. 32(c) of the EOA;

(iii) whether in relation to "burden of proof" the learned Election Judge had failed to recognize that the principles on Election Law differed from Civil Law in that under Election Law the burden of proof rested on both parties;

(iv) whether in relation to the provision of s. 32(a) and (c) of the EOA the learned Election Judge had failed to take into account of the different requirements to prove the alleged misconducts under these two sections;

(v) whether in relation to the plea of general intimidation under s. 32(a) of the EOA the learned Election Judge failed to recognize that the appellant has pleaded sufficient facts in support and the issue of proof of general intimidation is to be determined only after a full trial.

[14] We also take note that learned counsel for the appellant in his oral submission before us has not addressed us on the issue of whether the appellant has pleaded sufficient facts and grounds necessary to sustain the petition under s. 32(b) of the EOA, notwithstanding this issue appears as one of the grounds in the Memorandum of Appeal. On this issue we take the view that the appellant is not proceeding with this ground. At any rate it is our considered view based on the decision in the case of *Dato' Ismail bin Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors. (supra)* it is now settled law in Malaysia that if a petitioner pleads infringement of s. 32(b) of the EOA he must provide facts and grounds to show that a non-compliance with the provisions of any written law relating to the conduct of an election "affected

A the result of the election". In the present case as far as the pleading based on s. 32(b) of EOA is concerned only one voter was allegedly prevented from voting. In the circumstances we therefore find on this issue the learned Election Judge was right in his finding that this particular pleading was without merit.

B

[15] We shall now deal with the above five questions posed for our determination. As regards the first question the thrust of the arguments made by learned counsel for the appellant is that the learned Election Judge had erred in not properly applying r. 4(1) C of the EPR. It was submitted that if the learned Election Judge had carefully considered the pleading it will be wholly apparent that the facts and grounds relied on to sustain the prayer had been adequately pleaded. It was further submitted that the learned Election Judge in actual fact had struck out the petition D on the basis that the appellant had not pleaded evidence in his petition. To make his point learned counsel for the appellant quoted a passage of the judgment of the learned Election Judge as follows:

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> When he presents the petition the petitioner is expected to have possessed sufficient cogent evidence of the involvement of the first respondent to be able to set it out in his petition. (See page 24 of the Appeal Record).

[16] It is the contention of the appellant that from the above F statement, the learned Election Judge had made a fundamental and glaring error of law because it is expressly stated in r. 5 of the EPR that the appellant as the petitioner is not required to plead evidence. Rule 5 of the EPR provides as follows:

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> 5. Evidence not to be stated in petition but particulars may be ordered. Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial upon such terms as to costs and otherwise as H may be ordered.

[17] With respect to the above contention of the appellant, we are of the view that the learned Election Judge in his judgment had not intended it to mean that the appellant as the petitioner is I required to plead evidence in his petition. What the learned Election Judge meant in our view was for the appellant to have

already with him sufficient evidence to present his case at the trial in order for him to be able in the petition filed to set out the facts and grounds relied on to sustain the prayer. The learned Election Judge had in fact stated that the appellant as the petitioner is obliged to plead in the petition such material facts with such particulars where necessary to show on the face of the petition that he had cause to complain under one of the five provisions of s. 32 of the EOA before his case can be examined on the merit at a full hearing.

[18] On the issue of whether the facts and grounds necessary to sustain the petition have properly and adequately been pleaded by the appellant, we are of the view that the learned Election Judge had made correct conclusions and in line with a long list of authorities, including the decision of the Federal Court in the case of *Gan Joon Zin v. Fong Kui Lun & Ors.* [2004] 4 CLJ 729 which states that under the EPR it is a mandatory requirement that a petition must not only state the facts but also the grounds to sustain the prayer and failure to do so renders the petition defective.

[19] Further, *Gan Joon Zin*'s case also approves the principle that a petition must not only narrate the facts complained of but must also relate or associate the complaints with the provision of election laws alleged to have been transgressed. Failure to do so would give the power to an Election Judge to strike out an election petition in appropriate cases. This court has also approved the decision on these similar points in a number of leading cases cited as follows:

(i) *Patau Rubis v. Patrick Uren & Anor.* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348.

(ii) *Devan Nair v. Yong Kuan Teik* [1967] 1 LNS 37.

(iii) *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor.* [1988] 2 MLJ 384.

(iv) *Muip bin Tabib v. Dato James Wong* [1970] 1 LNS 83.

[20] It is our judgment that the learned Election Judge has not erred in law or in fact in concluding that the appellant has failed to plead sufficient facts and grounds to indicate that the corrupt

practice under s. 32(c) of the EOA was committed by the first respondent or with his knowledge or consent or by an agent of the first respondent. The learned Election Judge had correctly stated that the appellant as the petitioner would be required to state with precision such acts or instances which can be attributed to the first respondent to indicate his culpability and which he would have to verify at the hearing of the petition. We are of the view it is of vital importance that the petition must disclose a cause of action. The pleading must state a concise statement of material facts and the fullest possible particulars. The function of particulars is to present a full picture of the cause of action in order to make the opposite party understand the case he will have to meet. We have to also state here that since the pleading in relation to s. 32(c) of the EOA concerns "corrupt practice" the requirements of pleadings are strict. In the case of *Laxmi Narayan Nayak v. Ramratan Chaturvedi* [1990] 2 SCC 173 the court emphasized that the allegation of corrupt practices should not be vague. In the case of *Azhar Hussain v. Rajiv Gandhi* AIR [1986] Vol. 73 SC on this same point at pp. 1258 to 1259 the court *inter alia* held as follows:

> In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge.
>
> ...
>
> All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of section 83(1)(a). An election petition therefore can be and must be dismissed if it suffers from any such vice.

[21] On the second question as regards the issue of agency we are of the view the learned Election Judge is correct to conclude that the fact that a group of ten persons had held up the voter, that from amongst them one known to the voter had worn a PAS logo, and yet another in the group was recognized by the voter as the person who punched him, without more, is insufficient to show the culpability of the first respondent in the incident for this may well indicate that they were mere supporters whose acts the first respondent may not have any control of (see p. 18 of the Supplementary Record of Appeal). With respect, we find the

pleading in the petition filed by the appellant on agency rests on mere conjecture. Although the principles applicable in Election Law are wider, we are of the view the principles should not be so extended as to cast the net of agency too wide to include even ordinary party supporters. The principles as laid down in the case of *Ali Amberan v. Tunku Abdullah* [1969] 1 LNS 6 do not extend that far. Quoting *Taunton*'s case, Raja Azlan Shah J (His Royal Highness as he then was) approved the passage in the judgment reading it as follows:

> The rule of Law has long been established that in parliamentary matters we are not to consider the strict rule of common law agency ... **it has long been established that where a person has employed an agent for the purpose of procuring his election**, he, the candidate, is responsible for the act of that agent in committing corruption, though himself not only did not intend it but even *bona fide* did his best to hinder it. (emphasis added)

[22] On the strength of the above authority it is our judgment that there has to be an element of "appointment" wherein there is a nexus or connection between the named or identified persons alleged to be the "agents" and the first respondent as the candidate. The appellant has to plead this to allow the first respondent to meet the case. This element of "appointment" is present in the statement of the law as defined by Raja Azlan Shah J (His Royal Highness as he then was) in the case of *Ali Amberan* reproduced as follows:

> Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; and other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not or would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded as 'agents' of the candidate for election purposes.

[23] Based on the factual circumstances of the present case we find the learned Election Judge is correct in requiring the appellant to plead facts and grounds to show that the corrupt practice was committed, *inter alia* by any "agent" of the first respondent. This, the appellant has failed to do so.

[24] As regards the third question on the issue of burden of proof, we are of the view the learned Election Judge is correct not to have addressed the issue of burden of proof directly since he was deciding on the preliminary objection raised based on the tested principles and rules of Election Law. We agree with the submission of learned counsel for the first respondent that where the appellant's pleading falls foul of r. 4(1) of the EPR the appellant cannot argue that the burden lies on both parties. The issue of the first respondent having to prove matters within his peculiar knowledge relate properly to the shifting of the burden during the adduction of evidence at full trial. We are of the view that the decision in *Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors. (And Another Petition)* [2001] 3 CLJ 161 which holds that the burden of proof lies on both sides has to be read within this context. We therefore find this particular ground of appeal raised by the appellant at this stage where the petition has not proceeded at full trial is premature.

[25] Finally, we shall deal with the fourth and fifth questions together. The complaint of the appellant as the petitioner is that the learned Election Judge did not analyse the requirements of s. 32(a) of the EOA or consider whether the petition was adequately pleaded in this regard. On this issue of s. 32(a) of the EOA we find that the learned Election Judge is correct to hold that since the petition under s. 32(a) of the EOA alleging that acts of intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election, is premised on the same facts and grounds as alleged under s. 32(c) of the EOA, it must therefore suffer the same fate. This issue relating to the requirement of ss. 32(a) and 32(c) of the EOA was extensively argued before the learned Election Judge wherein he had made a finding that the pleading fails to state the material facts and grounds to support the claim under ss. 32(a) and 32(c) of the EOA. It may be true that different requirements are to be satisfied to show the elements of the respective acts of misconduct under ss. 32(a) and 32(c) of the EOA, but with regard to the facts and grounds relied on by the appellant it has been shown that they were the same – that it relates to the first incident on 8 March 2008 where it was alleged that the voter, Muhammad Amiruddin Mariappan bin Abdullah was prevented from voting and unable to vote.

Conclusion

[26] For the reasons above stated it is our unanimous decision that this appeal should be dismissed with costs. We would also order that the deposit be paid out to the first respondent to account for taxed costs and confirm the orders made by the learned Election Judge.